voluntarily, it is not as militia men that they act, but as citizens. If they are drafted, it must be in the same sense. In both instances they are enrolled in the militia corps, but that, as is presumed, cannot prevent the voluntary act in one instance, or the compulsive in the other. The whole population of the United States within certain ages belong to these corps. If the United States could not form regular armies from them they could raise none."[5] The citation of authorities, whether in opinions of judges or declarations of publicists, might be greatly extended.

In the case at bar, Chief Justice White recapitulates the propositions on which the constitutional power of Congress to compel military service is based as follows: "(a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority givn to Congess by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these priniiples it also follows that the power to call for military duty under the authority to declare war and raise armies, and the duty of the citizen to serve when called, were coterminous with the constitutional grant from which the authority was derived, and knew no limit deduced from a separate, and, for the purpose of the war power, wholly incidental if not irrelevant and subordinate, provision concerning the militia, found in the Constitution."

An item of interest to the profession is that the attorney for the government suggested that the brief of the appellant, because of "impertinent and scandalous passages" therein, should be stricken from the files. The court, however, while considering the characterization justified, ordered the brief kept upon the files as a warning "to what intemperance of statement an absence of self-sestraint or forgetfulness of decorum will lead."

*W. C. J.*

CONSTITUTIONAL LAW: STATE TAXATION OF FOREIGN CORPORATIONS.—It is unquestioned that a state may impose a tax on a foreign corporation for the privilege of conducting local business within the state.[1] Is such a tax valid when it is based on the corporation's entire capital stock? In Western Union Telegraph Company v. Kansas,[2] the most important of a series of cases

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[5] 7 Niles' Weekly Register, 137.

[1] Horn Silver Mining Company v. New York State (1892), 143 U. S. 305, 36 L. Ed. 164, 12 Sup. Ct. Rep. 403.

[2] (1910), 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190.

involving this question, the United States Supreme Court seemed to hold unreservedly that a tax so levied could not be sustained when the corporation owned property in another state and was engaged in interstate commerce. The tax was deemed violative both of the due process and commerce clauses in that it reaches property beyond the jurisdiction and imposed a burden upon interstate commerce.

The authority of that case was somewhat shaken by Baltic Mining Company v. Massachusetts.[3] The two cases appeared indistinguishable and the latter was severely criticized upon the ground that the Court, in attempting to disregard form and look to the substance, had sustained as a local excise a tax measured by capital representing property in part beyond the state's jurisdiction, and therefore condemned by the principle established in the Western Union Telegraph case.[4] In Looney v. Crane Company[5] there seemed to be a reversion to Western Union Telegraph Company v. Kansas, but the confusion was not entirely dispelled.

Fortunately the question has again presented itself, in the cases of *International Paper Company v. Massachusetts* and *Locomobile Company of America v. Massachusetts*,[6] and the Court has adopted a view which to some extent clarifies the law. While it repudiates the suggestion in Baltic Mining Company v. Massachusetts that the tax might be invalid as to common carriers but not as to other interstate corporations, the statement in Looney v. Crane Company is quoted with approval that the Baltic Mining Company v. Massachusetts and similar cases "in no way sustain the assumption that because a violation of the constitution was not a large one it would be sanctioned." The Baltic Mining Company case is distinguished on the ground that at the time when that case was decided the Massachusetts statute fixed a monetary limit beyond which the tax could not be imposed, regardless of the amount of capital, thus making it in effect nothing more than a reasonable license fee for the privilege of doing local business. Since then the Massachusetts statute has been amended so as to remove the monetary limit and it is therefore held unconstitutional in the principal cases. While the Baltic Mining Company case is sustained on this subtle ground, the Supreme Court points out that the case must be carefully limited and not so interpreted as to impair the authority of Western Union Telegraph Company v. Kansas.

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[3] (1913), 231 U. S. 68, 58 L. Ed. 127, 34 Sup. Ct. Rep. 15.

[4] Albert Pick & Co. v. Jordan (1914), 169 Cal. 1, 145 Pac. 506, Ann. Cas. 1916C 1237.

[5] (Dec. 10, 1917), U. S. Adv. Ops. 1917, 178.

[6] (March 4, 1918), U. S. Adv. Ops. 1917, 319; (March 4, 1918), U. S. Adv. Ops. 1917, 322.

In view of this holding, the California case of Albert Pick Company v. Jordan[7] may no longer represent the law in this state.

*E. M. C.*

EVIDENCE: JUDICIAL NOTICE.—In the case of *Varcoe v. Lee et al*,[1] an action for personal injury from collision with an automobile, the plaintiff recovered a verdict. The judgment is reversed on the sole ground that the judge told the jury the place where the accident occurred was a business district as defined by the State Motor Vehicle Act. The delay and the expense of a new trial in a jury case is a serious matter. Unless there has been a miscarriage of justice the judgment should be affirmed.[2] Does such miscarriage appear in this case? Clearly not. For all the opinion shows, there was absolutely no dispute as to whether the place was a business district. How then could it be error to charge the jury that it was such? The opinion does not say that the court is limited by section 1875 of the Code of Civil Procedure as to the matters of which judicial notice may be taken. That section is poorly worded, omitting as it does matters of common notoriety. But here as elsewhere in the code the courts have construed the narrow code provisions as not exclusive of the common law.[3] Accordingly judicial notice has been taken of many matters of common notoriety,[4] and if the character of the place as a business district were known to everybody, what an absurdity to say that the jury should pretend to be ignorant of it! But if the place is as an undisputed fact a business district who knows that fact so well as the local judge or jury?[5] How can the Appellate Court reverse the trial judge except by taking judicial notice itself that the character of the place as a business district could be disputed, in other words by doing exactly what it has said the trial court should not do. To borrow Chamberlayne's terminology, is it not the true function of judicial administration to give the trial court a large power in taking judicial notice and should it not be necessary for the party alleging error to offer sufficient evidence to show that the matter is a disputable one that should be left to the jury? It is a question of the burden of proof.[6] Were this sensible procedure followed trials would be greatly shortened by the elimination of matters on which there is not dispute and new trials would not be necessary unless the appellant showed actual prejudice from the record.[7]

*A. M. K.*

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[7] Supra, n. 4.

[1] (May 13, 1918), 26 Cal. App. Dec. 987.

[2] Cal. Const. Art. VI, Sec. 4½.

[3] People v. Mayes (1896), 113 Cal. 618, 625, 45 Pac. 860 (dictum).

[4] 3 California Law Review, 238.

[5] Considerable diversity exists in the precedents. Chamberlayne, The Modern Law of Evidence, § 746; Wigmore, Evidence, § 2580.

[6] Chamberlayne, § 700.

[7] "Taking judicial notice does not import that the matter is indisputable.